

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

RIVERBEND RANCH GOLF COURSE,	)	No. CV-F-97-5550 REC
et al.,	)	
	)	ORDER DENYING PLAINTIFF'S
	)	MOTION FOR RELIEF
Plaintiff,	)	
	)	
vs.	)	
	)	
COUNTY OF MADERA, et al.,	)	
	)	
Defendant.	)	
	)	
	)	

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On April 4, 2005, the court heard plaintiff Riverbend Ranches motion to set aside the judgment entered in this action on January 20, 2005 pursuant to Rule 60(b), Federal Rules of Civil Procedure.

Upon due consideration of the record and the arguments of the parties, the court denies this motion for the reasons set forth herein.

On March 7, 2005, plaintiff Riverbend Ranches (hereinafter referred to as Riverbend) filed a motion to set aside the

1 judgment entered in this action on January 20, 2005 pursuant to  
2 Rule 60(b), Federal Rules of Civil Procedure, and to set the  
3 matter for trial on the Tenth Claim for Relief. Riverbend  
4 asserts that this motion should be granted because there is newly  
5 discovered evidence and/or evidence which was not provided to the  
6 court through mistake, inadvertence or excusable neglect.

7 In its "Order Granting Defendant's Motion for Summary  
8 Judgment on State Law Claims in Second Amended Complaint and  
9 Directing Entry of Judgment for Defendants" filed on January 20,  
10 2005 (hereinafter referred to as the January 20 Order), the court  
11 ruled in pertinent part with respect to the Tenth Claim for  
12 Relief that Riverbend had not substantially complied with the  
13 claim requirement of the California Government Tort Claims Act  
14 and, therefore, was not entitled to damages with respect to that  
15 claim.

16 Riverbend moves to vacate this judgment with respect to the  
17 Tenth Claim for Relief on the ground of newly discovered evidence  
18 and/or evidence which was not presented to the court through  
19 mistake, inadvertence or excusable neglect.

20 In moving to vacate the judgment pursuant to Rule 60(b),  
21 Riverbend submits the Declaration of Thomas T. Watson, who avers  
22 in pertinent part:

23 2. The firm of Watson & Doyle associated in  
24 this case on February 15, 2005. Upon being  
25 retained, I immediately attempted to review  
26 all of the documents and pleadings related to  
this matter which consisted of an excess of  
forty boxes. Contained in these boxes was  
correspondence dated July 19, 1996, August 5,

1 1996 and January 3, 1997 ... In reviewing the  
2 January 15, 2005 Order it was apparent to me  
3 that these documents were neither submitted  
4 nor considered by the Court in its  
5 determination that the Gay-Straight Alliance  
case was not applicable. Apparently, this  
correspondence which was newly discovered by  
me, was inadvertently not a part of the the  
court's record and was not before the court.

6 Attached to Mr. Watson's declaration are the three letters  
7 referred to therein. The first is a letter from James A.  
8 McKelvey, then counsel for Riverbend Ranch, to Jeffrey L. Kuhn of  
9 the County of Madera dated July 29, 1996. The second letter is  
10 from Mr. McKelvey to Mr. Kuhn dated August 5, 1996. The third  
11 letter is from Mr. McKelvey to Mr. Kuhn dated January 3, 1997.

12 Rule 60(b) provides in pertinent part:

13 On motion and upon such terms as are just,  
14 the court may relieve a party or a party's  
15 legal representative from a final judgment  
16 ... for the following reasons: (1) mistake,  
17 inadvertence, surprise or excusable neglect;  
(2) newly discovered evidence which by due  
diligence could not have been discovered in  
time to move for a new trial under Rule 59(b)  
....

18 Resolution of a motion to vacate judgment under Rule 60(b)(1) or  
19 (2) is within the court's discretion.

20 In order to be entitled to vacation of judgment on the  
21 ground of newly discovered evidence, the movant must show that  
22 the evidence (1) existed at the time of the trial, (2) could not  
23 have been discovered through due diligence, and (3) was of such  
24 magnitude that production of it earlier would have been likely to  
25 change the disposition of the case. Coastal Transfer Co. v.  
26 Toyota Motor Sales, U.S.A., 833 F.2d 208, 211 (9<sup>th</sup> Cir. 1987).

1 Riverbend has not made the requisite showing. It is clear  
2 from Mr. Watson's declaration that the evidence upon which  
3 Riverbend relies has been in the possession of counsel for  
4 Riverbend since this litigation commenced. "Evidence is not  
5 'newly discovered' under the Federal Rules if it was in the  
6 moving party's possession at the time of trial or could have been  
7 discovered with reasonable diligence." Id. The fact that Mr.  
8 Oeser was representing Riverbend at the time of the summary  
9 judgment motion does not change this fact. In addition, it is  
10 clear that Mr. Oeser did not act with reasonable diligence in  
11 reviewing the evidence in this action. The motion for summary  
12 judgment was filed on July 23, 2004 and Riverbend's opposition  
13 was not filed until November 1, 2004. Therefore, Riverbend had  
14 more than ample time to review the documents in this action and  
15 present them to the court in opposition to the County's summary  
16 judgment motion. Therefore, the court concludes that Riverbend  
17 is not entitled to vacation of the judgment pursuant to Rule  
18 60(b) (2).

19 Riverbend also bases this motion on the grounds of  
20 inadvertence or excusable neglect. Riverbend's new attorneys  
21 argue:

22 As new counsel, Riverbend's current attorneys  
23 are not privy to all of the information  
24 relating to discovery and motions that have  
25 occurred in this case which has lasted over  
26 six years and has involved multiple counsel.  
The complexity, length of time and confusion  
of multiple counsel, one of which appears to  
have failed to meet his basic obligations to  
the Court in responding to motions and

1           discovery, provides ample grounds to  
2           establish inadvertency, mistake or excusable  
3           neglect.

4           In Pioneer Investment v. Brunswick, 507 U.S. 380 (1993), the  
5           Supreme Court addressed the meaning of "excusable neglect" for  
6           purposes of the Bankruptcy Rules in a situation where the  
7           creditors' attorney failed to file documents within the time  
8           required by the rules. The Supreme Court stated in pertinent  
9           part:

10           Because Congress has provided no other  
11           guideposts for determining what sorts of  
12           neglect will be considered 'excusable,' we  
13           conclude that the determination is at bottom  
14           an equitable one, taking account of all  
15           relevant circumstances surrounding the  
16           party's omission. These include ... the  
17           danger of prejudice to the debtor, the length  
18           of the delay and its potential impact on  
19           judicial proceedings, the reason for the  
20           delay, including whether it was within the  
21           reasonable control of the movant, and whether  
22           the movant acted in good faith.

23           507 U.S. at 395. The Ninth Circuit holds that the equitable test  
24           set out in Pioneer applies to Rule 60(b). Briones v. Riviera  
25           Hotel & Casino, 116 F.3d 379 (9<sup>th</sup> Cir. 1997).

26           Here, it is arguable that Riverbend's troubles with its  
27           various attorneys, especially Mr. Stevenson, resulted in Mr.  
28           Oeser's inability to fully familiarize himself with the evidence  
29           in this case. Nonetheless, as noted above, Mr. Oeser had several  
30           months to prepare for the opposition to the motion for summary  
31           judgment. Furthermore, as the County notes, the letters upon  
32           which Riverbend relies in this motion were authored by Mr.  
33           McKelvey. Although Mr. McKelvey was disqualified as Riverbend's

1 counsel in February, 1998, he has participated as witness for  
2 Riverbend in this action, as evidenced by declarations filed by  
3 Mr. McKelvey and filed with this court on August 14, 2000 and  
4 November 1, 2004. Therefore, the contention of Riverbend's most  
5 recent attorneys that they were precluded by court order from  
6 consulting with Mr. McKelvey for assistance in reviewing the  
7 record in this action is not sustainable. There is no question  
8 that there is prejudice to the County. This case has been before  
9 this court since 1997. The County's motion was on file for  
10 several months before it was heard because of Mr. Oeser's  
11 requests for continuance. Since judgment was entered, the County  
12 has filed a motion for attorneys' fees and a bill of costs, all  
13 time wasted because of Riverbend's belated review of the evidence  
14 in this case. After judgment was entered, Riverbend retained yet  
15 another set of attorneys (although Mr. Oeser also remains as  
16 counsel) with the apparent view of reviewing the evidence to see  
17 if there was any possible basis for vacating the judgment. The  
18 retention of the new attorneys apparently delayed the review  
19 until after the time for a motion under Rule 59 had elapsed. The  
20 potential impact on judicial proceedings is that resolution of  
21 this action, already on file for eight years, will be further  
22 delayed, delay caused almost entirely by the actions of Riverbend  
23 or its attorneys. Riverbend and its attorneys had the evidence  
24 upon which they seek to vacate the judgment in its possession  
25 and, in fact, Riverbend generated the evidence. While the court  
26 has no reason to doubt that Mr. Oeser acted in good faith, the

1 court note that he was given continuances to respond to the  
2 motion for summary judgment and had ample time to review the  
3 record in this action. It is noted that Riverbend did not oppose  
4 or respond to a number of grounds asserted by the County for  
5 summary judgment, electing to focus the opposition on only two  
6 claims for relief. Riverbend's argument that the County is not  
7 prejudiced because the County had possession of these documents  
8 as well is not persuasive under the circumstances of this case.  
9 As noted, this case has been in this court since 1997. The  
10 County finally heard its motion for summary judgment on the  
11 remaining state law causes of action after months of delay and  
12 received final judgment in this action. As noted, the County has  
13 since filed a post-judgment motion for attorneys fees and a bill  
14 of costs, thereby expending more monies that would not have been  
15 necessary. Therefore, the court concludes that Riverbend has not  
16 demonstrated mistake, inadvertence, surprise or excusable neglect  
17 within the meaning of Rule 60(b)(1).

18 Accordingly, plaintiff's motion for relief pursuant to Rule  
19 60(b), Federal Rules of Civil Procedure, is denied.

20 IT IS SO ORDERED.

21 **Dated: April 28, 2005**  
22 668554

**/s/ Robert E. Coyle**  
UNITED STATES DISTRICT JUDGE